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No. 98-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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MISCELLANEOUS:

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Marcia Coyle, "D.C. Circuit Aggravates Title VII Split," *National Law Journal* (June 8, 1998), B1 1

REPLY BRIEF FOR PETITIONER

This is the case that prompted the National Law Journal headline, "D.C. Circuit Aggravates Title VII Split." *National Law Journal*, June 8, 1998, B1.

> The conflicting decisions—the earlier one from the 2d U.S. Circuit Court of Appeals and the more recent one from the D.C. Circuit—have drawn battle lines over the standard for imposing punitive damages under Title VII. . . .

Id.[1]

Respondent attempts to obscure this conflict by basing its brief on a straightforward but palpably mistaken hypothesis. It urges this Court to assume that there could be only two possible standards for punitive damages, either the D.C. Circuit requirement that "there must be a showing of egregious conduct" (Br. Opp. 3), or "a rule that would allow a jury unfettered discretion to award punitive damages in every Title VII case of intentional discrimination." (Br. Opp.

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[1] The story quoted a leading defense attorney as objecting, with regard to *Luciano v. Olsten Corp.*, 110 F. 3d 210 (2d Cir. 1997), that "under the 2d Circuit's approach, all disparate treatment cases would warrant punitive damages . . . ." *Id.*

A similar analysis in the Labor Relations Reporter described the same conflict:

> A majority of the divided [en banc court in *Kolstad*] weighs in on the side of those courts of appeals that have interpreted the punitive damages provisions of the Civil Rights Act of 1991 as not making such damages automatically available in a standard case of intentional discrimination. ***Other circuits hold that a finding of intentional discrimination suffices to put the issue of punitive damages to the jury.***

158 LRR 106 (1998)(Emphasis added).

1). Insisting that no court has adopted the latter rule,[2] Respondent infers that all the circuit courts must therefore follow the former.

However, as we explained in the petition, most courts in fact apply one or more of several intermediate rules, all of which conflict with the extraordinarily stringent D.C. Circuit standard. Those other circuits treat as sufficient to support an award of punitive damages evidence demonstrating either (1) "consciousness of wrongdoing" on the part of the employer, (2) involvement of management in the discriminatory action, (3) a deliberate scheme to perpetrate the discriminatory act, or (4) duplicitous behavior to cover up the discrimination. (Pet. 12-14).

Even the en banc majority acknowledged that its decision conflicted with the Second Circuit opinion in *Luciano v. Olsten Corp.*, 110 F. 3d 210 (2d Cir. 1997), which the court below correctly described as holding that, once intentional discrimination has been proven, "no additional evidence is required for punitive liability." (Pet. App. 20a). Respondent insists that the Second Circuit in fact adopted the D.C. Circuit's egregiousness standard, emphasizing that the word "egregious" can be found in the *Luciano* decision. (Br. Opp. 5). The utilization of that word in *Luciano*, however, occurs in an analysis upholding the amount of the punitive damage award, and is part of a passage explaining why the jury in that

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[2] Respondent also ignores totally the views of the five dissenting en banc judges, who did not espouse the latter rule. *See* Pet. App. at 28a-31a.

case awarded $5 million.[3] The word "egregious" is not part of the Second Circuit's standard as to when punitive damages can be awarded. To the contrary, *Luciano* held that the standard for punitive awards under Title VII should be the same as under section 1981:

> punitive damages [are] available for claims of race discrimination under 42 U.S.C. §1981 where defendant's conduct is motivated by an evil motive, or involves reckless indifference to federally protected rights. . . .

110 F. 3d at 220, and under section 1983:

> punitive damages awards [are available for] §1983 violations . . . when conduct is "motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others."

Id.

Respondent's insistence that the en banc opinion below is consistent with the decision in *Kim v. Nash Finch Co.*, 123 F. 3d 1046 (8th Cir. 1997), is particularly surprising. (Br. Opp. 6). The Eighth Circuit in *Kim* followed the Second Circuit's

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[3] The passage is as follows:

> The jury awarded Luciano $5,000,002 in punitive damages, finding Olstens's discriminatory conduct egregious and its wealth such that a large award was necessary o punish and deter a corporation of this size. Thus, it cannot be said that the district court erred in finding that with regard to a corporation as financially well-situated as Olsten, a punitive award of $300,000 was 'modest' and would not cause financial ruin.

110 F. 3d at 222. The district court had reduced the punitive award to $300,000 because of the statutory cap on such awards.

Luciano decision and expressly adopted the standard in the original panel decision written by Judge Tatel in this very case. 123 F. 3d at 1066. That panel decision is obviously inconsistent with the contrary holding of the en banc majority from which five active Circuit Judges dissented in an opinion authored by Judge Tatel. (Pet. App. 24a-41a). Respondent's argument that *Kim* merely found the statutory requirements were "met by the evidence in the case" (Br. Opp. 6) pointedly ignores the critical portion of the *Kim* decision which adopts a legal standard quite inconsistent with the decision in this case, holding that punitive damages can be awarded on without requiring plaintiff to demonstrate "something more than that required by the statute." 123 F. 3d at 1066.

Respondent dismisses the conflicting Ninth Circuit precedent in a single sentence, simply noting that that circuit requires "evidence of conduct more egregious than intentional discrimination." (Br. Opp. 7)(quoting *Ngo v. Reno Hilton Resort Corp.*, 140 F. 3d 1299, 1304 (9th Cir. 1998)). Again, Respondent simply ignores the rest of the opinion in *Ngo*, which goes on to explain what more than simple intentional discrimination is required in the Ninth Circuit:

> [T]o be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant "almost certainly knew that what he was doing was wrongful and subject to punishment."

140 F. 3d at 1304. The standard in *Ngo* obviously was satisfied in the instant case. More recently the Ninth Circuit held that punitive damages could also be awarded where a defendant had planned or attempted to cover up its discriminatory action:

> [T]he evidence regarding the attempts by Wal-Mart managers to cover up their discriminatory conduct

> supports the EEOC's claim of reckless indifference to Stern's federally protected rights. The EEOC's Enforcement Guidelines provide that evidence that an employer's agents "planned and/or attempted to conceal or cover-up the discriminatory practices or conduct" can support a finding that the employer acted "with malice or reckless indifference to the complaining party's federally protected rights." EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under 102 of the Civil Rights Act of 1991 . . . . In this case, the EEOC presented the jury with evidence that Wal-Mart provided false reasons for not hiring Stern.

EEOC v. Wal-Mart Stores, 1998 WL 652140 at *5 (9th Cir. Sept. 24, 1998). A similar cover up scheme was proven in the instant case.

Respondent describes *Adaki v. Front Row Seat, Inc.*, 1997 WL 603458 (10th Cir. 1997), as if it merely "recited the evidence supporting the punitive damages award in that case." (Br. Opp. 6). But *Adaki* actually expressly adopts a specific legal standard inconsistent with the en banc opinion in this case:

> The requisite level of recklessness or outrageousness [required to support punitive damages] can be inferred from management's participation in the discriminatory conduct.

1997 WL 603458 at *2 (bracketed material in original)(Quoting *Kim v. Nash Finch Co.*). That standard is easily satisfied by the facts of this case, in which the discriminatory decision involved Respondent's national executive director.

Respondent dismisses First Circuit precedent as holding no more than that "[t]here is no vested right to punitive damages . . . ." (Br. Opp. 6)(quoting *McKinnon v. Kwong Wah Restaurant*, 83 F3d. 498, 508 (1st Cir. 1996). To the contrary, decisions in that circuit—which Respondent totally ignores—have long held that proof of intentional discrimination alone will ordinarily be sufficient to support an award of punitive damages.

> This circuit has held that under federal law the evidence of intent that is necessary to support a punitive damages award "is the same [evidence of] 'intent' that is required for a finding of discrimination in the first place."

Criado v. IBM Corporation, 145 F.3d 437, 445 (1st Cir. 1998).

> A jury need not find some special sort of malign purpose in order to exact punitive damages in a disparate treatment case because the "intent" that is necessary to undergird an award of punitive damages in such a case is the same "intent" that is required for a finding of discrimination in the first place.

Dichner v. Liberty Travel, 141 F. 3d 24, 33-34 (1st Cir. 1998). *Dichner* quoted and relied the First Circuit's earlier decision in *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987), that "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable." *Id.* at 205. *McKinnon* simply reiterated this rule, adding only that a punitive award might not be appropriate where a defendant lacked "consciousness of wrongdoing", 83 F. 3d at 509, a mitigating circumstances obviously absent in the instant case.

That the decision below conflicts with this Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983), is strikingly illustrated by a simple comparison of Respondent's description of the decision below with the actual holding in *Smith* itself.

> [M]ore than a certain state of mind is required for the award of punitive damages . . . . The purpose of punitive damages *is not to punish a defendant for a bad mental state*, but to punish him "for his outrageous conduct and to deter him and others like him from similar conduct." . . . . The court of appeals meticulously catalogued all the references in *Smith* . . . in favor of the requirement that punitive damages be based on outrageous or egregious conduct.

(Br. Opp. 8-11)(Emphasis added). *Smith* itself, however, states at its conclusion:

> We hold that a jury may be permitted to assess punitive damages . . . when the defendant's conduct is shown *to be motivated by evil motive or intent*, or when it involves reckless or callous indifference to the federally protected rights of others.

461 U.S. at 56 (Emphasis added).

In response to Petitioner's argument that the decision below represents a nearly identical attempt to engraft an "egregiousness" standard onto a discrimination statute which this Court disapproved in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (Pet. 22a-23a), involving the ADEA, Respondent claims that "there is no indication that Congress meant to equate the ADEA's standard of willfulness with the standard for punitive damages under §1981a." (Br. Opp. 11-12). This Court, however, reaffirmed in *Hazen Paper* the

definition of "willful" under the ADEA, which had been adopted in *Trans World Airlines v. Thurston*, 468 U.S. 111, 126 (1985): "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." 507 U.S. at 617. That definition is the precise analog of the language Congress chose to incorporate in §1981a(b)(1). The decision below simply cannot be reconciled with this Court's holding in *Hazen Paper* that "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation. . . ." (*id.*), in order to recover liquidated (double) damages.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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